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No. 71-1025

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

HENRY COUNTY BEVERAGE COMPANY, INC.,
PETITIONER

v.

SECRETARY OF THE TREASURY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ERWIN N. GRISWOLD,
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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C), and its order denying rehearing, are not yet reported. The order of the Secretary of the Treasury (Pet. App. A) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 2, 1971, and a petition for rehearing

was denied on January 11, 1972. The petition for a writ of certiorari was filed on February 10, 1972. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of the Treasury properly found that petitioner had committed "fraud, or misrepresentation or concealment of material fact" under the Federal Alcohol Administration Act by its wilful failure to disclose in its application for a beer wholesaler permit the background of its principal officer and major shareholder, who secretly held a controlling financial interest in petitioner's sole competitor.

STATUTES INVOLVED

In addition to Section 5(a) of the Federal Alcohol Administration Act, 49 Stat. 981, as amended, 27 U.S.C. 205(a), reproduced in the petition (Pet., pp. 2-4), involved here is Section 4(a)(2) and (e)(3) of the Federal Alcohol Administration Act, 49 Stat. 978, as amended, 27 U.S.C. 204(a)(2) and (e)(3), which provides in material part:

> (a) The following persons shall, on application therefor, be entitled to a basic permit:
>
> * * * *
>
> (2) Any person unless the Secretary of the Treasury finds * * * (B) that such person is, by reason of his business experience, financial

standing, or trade connections, not likely to commence operations within a reasonable period or to maintain such operations in conformity with Federal law; or (C) that the operations proposed to be conducted by such person are in violation of the law of the State in which they are to be conducted.

* * * *

(e) A basic permit shall by order of the Secretary of the Treasury, after due notice and opportunity for hearing to the permittee, * * * (3) be annulled if the Secretary finds that the permit was procured through fraud, or misrepresentation, or concealment of material fact. The order shall state the findings which are the basis for the order.

STATEMENT

On November 14, 1969, following an investigation, the Assistant Regional Commissioner of the Internal Revenue Service ordered petitioner, a wholesale beer distributorship operating in New Castle, Indiana, to show cause why its federal wholesaler's basic permit should not be annulled for willful and knowing misrepresentation and concealment of a material fact. The show-cause order alleged that since November 26, 1958, the president and major shareholder of petitioner, Marshall L. Davis, Sr., held a substantial undisclosed interest in and exercised extensive control over petitioner's sole competitor in New Castle, Norris Beverage Distributors, and that in its most recent application for a wholesaler's basic permit

dated December 5, 1968, and in an addendum dated December 30, 1968, petitioner deliberately concealed a material fact by failing to disclose the financial interest of Davis in Norris Beverage Distributors, although such information was expressly required in the application and addendum.

The order further charged that under Indiana law, it is illegal for any person to possess an interest in more than one wholesale beer permit, and that under federal law it is unlawful for any person to channel the sale of malt beverages into one of two controlled competing beer wholesalers. The order alleged that had Davis' financial interest in Norris Beverage Distributors been revealed, petitioner's application would have been denied because the true business experience and trade connections of Davis made it unlikely that petitioner would maintain operations in conformity with federal law.

Petitioner does not now controvert that it willfully filed a false permit application by failing to disclose the longstanding financial interest of its president and major shareholder in a competitor wholesale distributorship (Pet., p. 4). The hearing examiner to whom the case was assigned (Pet. App. A, p. 5a), the Secretary of the Treasury (Pet. App. B, pp. 5b-7b), and a unanimous court of appeals (Pet. App. C, p. 5c), held that the record shows a consistent pattern of deception and anticompetitive conduct by petitioner's dominant officer and shareholder spanning more than a decade. After reviewing the elaborate series of transactions leading to Davis' undis-

puted individual control over rival beer distributorships from 1958 until the latter part of 1966, the court of appeals concluded: "We think it is established by the record in this case that had Davis' secret control of Norris Beverage been disclosed in Henry County's permit application, the application would have been denied" (*id.* at 4c).[1]

ARGUMENT

The single issue on which review is sought, whether the facts which petitioner deliberately concealed are "material," presents nothing of general importance and does not warrant further review. The purpose of the extensive regulatory procedure for the issuance of permits mandated by the Federal Alcohol Administration Act is to prevent persons likely to violate state or federal liquor laws from entering the business of distributing alcoholic beverages. *White* v. *United States*, 355 F.2d 58, 63 (C.A. 8). Any misrepresentation or concealment of fact relating to the identity or character of the principals to a permit application is, therefore, material as a matter of law. *Ibid.* Accord: *Seaway Beverages, Inc.* v. *Dillon*, 319 F.2d 722, 723 (C.A.D.C.); *Pincourt* v. *Palmer*, 190 F.2d 390, 393 (C.A. 3); *Thomas J. Molloy & Co., Inc.* v. *Berkshire*, 143 F.2d 218, 221 (C.A. 2), certiorari denied, 323 U.S. 802.

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[1] Petitioner continues to operate under its wholesaler's basic permit during pendency of all review proceedings, pursuant to Section 4(h) of the Federal Alcohol Administration Act, 27 U.S.C. 204(h).

More specifically, in the context of this case, full disclosure of the interest of petitioner's principal shareholder in Norris Beverage Distributors would have led to the discovery of the deceptive manner in which the real ownership of Norris Beverage Distributors was concealed as well as the anti-competitive manner in which it was operated for the benefit of petitioner (Pet. App. B, pp. 4b-7b). The court of appeals held that these anti-competitive practices violated Section 5(a) of the Act (Pet. App. C, p. 4c).

The court of appeals also ruled that from 1958 until 1966, when petitioner (then a partnership) incorporated, it operated in violation of Indiana law since one of its partners (now its principal stockholder) had a controlling interest in Norris Beverage Distributors.[2] This fact would also have been discovered had full disclosure been made in petitioner's application. The inability of petitioner's principal to conduct the business operations of petitioner and Norris Beverage Distributors in conformity with State and Federal law in the past is material in determining whether petitioner is likely to conduct its operations in conformity with Federal law in the fu-

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[2] During this period Davis' dual interest violated Indiana law. 4 BURNS IND. STAT. ANN. 12-508, 12-915 (1956), amended in 1966 (1970 Cum. Supp.). Petitioner was incorporated in December 1966, having previously existed as a partnership consisting of Davis and another. Based on its present status, petitioner broadly asserts that the challenged dual control does not violate state law; petitioner ignores the date and statutory significance of its incorporation (Pet., pp. 9-10).

ture, as required by Section 4(a)(2). *Lovers* v. *Berkshire*, 159 F.2d 689, 694 (C.A. 10).

In sum, there is little question that the facts relating to the interest of petitioner's principal shareholder in Norris Beverage Distributors were matters to which one deciding whether to issue a license would "attach importance in determining his * * * action" and hence were "material". *Johns Hopkins University* v. *Hutton*, 422 F.2d 1124, 1128-29 (C.A. 4), quoting *Restatement of the Law of Torts*, 538(2)(a) (Vol. III); see also, *Mills* v. *Electric Auto-lite*, 396 U.S. 375, 384.[3]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WALKER B. COMEGYS,
Acting Assistant Attorney General.

MARCH 1972.

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[3] The suggestion (Pet., p. 6) that the administrative decision to revoke petitioner's license was made solely in reliance on *Federal Communications Commission* v. *WOKO, Inc.*, 329 U.S. 223, 226-27, which held in a somewhat different context that "[t]he fact of concealment may be more significant than the facts concealed," ignores the detailed findings of both administrative officers (Pet. App. A, pp. 5a-6a; Pet. App. B, pp. 9b-10b). While both cited that case as analogous authority, each decision rested on an express finding that the facts petitioner concealed were material.

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